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Supreme Court, U.S.
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No. 87-1275

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1987

REPLAN DEVELOPMENT, INC. and
EDWARD C. RUBIN,

Appellants,

-against-

DEPARTMENT OF HOUSING PRESERVATION AND DEVELOPMENT OF THE CITY OF NEW YORK and THE CITY OF NEW YORK,

Appellees.

ON APPEAL FROM THE NEW YORK STATE COURT OF APPEALS

MOTION TO DISMISS OR AFFIRM

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March 2, 1988

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No. 87-1275

IN THE
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DEPARTMENT OF HOUSING PRESERVATION AND DEVELOPMENT OF THE CITY OF NEW YORK and THE CITY OF NEW YORK,

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ON APPEAL FROM THE NEW YORK STATE COURT OF APPEALS

MOTION TO DISMISS OR AFFIRM

STATEMENT

Appellees move to dismiss appellants' appeal or, in the alternative, to affirm the judgment of the Court of Appeals of the State of New York entered November 19, 1987. The appeal does not present a substantial federal question. The law as to

retroactive tax legislation is well established and was properly applied.

QUESTION PRESENTED

Do §489 of the New York Real Property Tax Law and §11-243 (formerly §J51-2.5) of the Administrative Code of the City of New York, enacted pursuant thereto (collectively referred to as the "J51 law"), deprive appellants of any constitutional right, given that: (a) there could be no justified reliance on the prior law; (b) there were no vested rights to any tax benefits thereunder; (c) the retroactivity was for only one year; and (d) its public purpose was to prevent evasive measures occurring between the introduction of the bill and its enactment into law?

FACTS

(1)

"J51" is a statutory tax incentive program, originally enacted in 1955, to encourage improvements and alterations to existing buildings so as to increase the short supply of safe and habitable class A multiple dwellings. It is based on Real Property Tax Law ("RPTL") §489, the state enabling law, and Administrative Code of the City of New York ("Admin. Code") §11-243, the local law enacted for its effectuation.

The program provides for benefits in the form of partial exemption from real property taxation and abatement of remaining taxes to recoup the costs of alterations over a specified period of years. It is administered by the City's Department of Housing Preservation and Development ("HPD") which is authorized to promulgate rules and to make decisions.

All of the statutory conditions must be met to qualify for benefits. These include, inter alia, commencement and completion of reconstruction within the time limits set forth in the statute. Determination as to entitlement to benefits and the extent thereof is made by HPD after the application is received. Application cannot be made until after the work is finished. Consequently, no benefits vest merely upon commencement of a project.

The J51 law has been re-enacted and amended several times following its original enactment, each time with a fixed expiration date. Benefits have been expanded for certain types of projects and curtailed for others, in keeping with problems revealed by experience and goals of the program. The last re-enactment of RPTL §489, the enabling statute, became effective June 30, 1983. It was made retroactive to June 1, 1982, the

date when the prior version expired. Laws of 1983, chapter 401, §6 (M-A-1).[1] Consistent therewith, Admin. Code §J51-2.5 (now §11-243) was amended November 7, 1983, and also made retroactive to June 1, 1982. Local Law No. 56 of 1983, §11 (M-A-2).

As amended, these statutes expressly prohibit the grant of benefits for conversions of multiple dwellings that were used in whole or in part for single room occupancy ("SRO's") to class A multiple dwellings that are not so used. RPTL §489(1)(a)(1) and (13); Admin. Code §11-243(i)(6); (M-A-1-3). However, they contain a "grandfather clause" so that

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1 Parenthetical references to M-A are to the Appendix attached to this motion. Parenthetical references to JS-A are to the Appendix accompanying appellants' Jurisdictional Statement.

conversions of SRO's commenced prior to July 1, 1982 remained eligible for benefits. L. 1983, c. 401, §15 (M-A-1); Admin. Code §11-243(i)(6) and Local Law No. 56 of 1983 §11(1) (M-A-2-3). "Commencement" is defined in Section 2.4(5) of the J51 Tax Exemption and Tax Abatement Rules and Regulations as the date of issuance of a permit by a City agency (JS-A-41).[2]

SRO's serve to shelter low-income elderly and infirm persons and thus constitute an important part of the City's housing stock. When the J51 program resulted in large numbers of SRO's being

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[2] On page A-30 of the Jurisdictional Statement, appellants reprint a definition of commencement that is not taken from the J51 law or the rules promulgated thereunder. It comes from a different local law separately codified in the Administrative Code. The state courts rejected a previous attempt to apply this irrelevant section of the Code to this case (JS-A-10).

eliminated by conversion and demolition, the consequence was a serious loss in low-cost housing, forcing many former occupants to become homeless. To prevent this loss from growing even worse, the State Legislature, followed by the City Council, amended J51 to eliminate tax incentives for the conversion of SRO's to housing beyond the means of the low-income people who formerly occupied them. This was a clear legislative response to a public emergency.[3]

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[3] Indeed, the homeless problem addressed by RPTL §489(13) and Admin. Code §11-243(i)(6) is so grave that other ameliorative measures have also been enacted in an attempt to halt its expansion. Local Law No. 59 of 1985 prescribes a moratorium on any and all conversions, alterations, and demolitions of SRO's, and amends Local Law No. 19 of 1983 to tighten the regulatory controls of SRO landlords first instituted by Local Law No. 56 of 1982.

Appellants are the owners of property located at 427-429 West 22nd Street, Borough of Manhattan (officially designated Block 720, Lots 33, 34). When it was acquired, it consisted of two vacant class B multiple dwellings, certified as SRO's. Thereafter, appellants converted the buildings into one class A multiple dwelling containing eight cooperative apartments, not certified as an SRO. The permit for this conversion was issued by the City's Department of Buildings on April 7, 1983.

On January 11, 1984, after the J51 law was amended to prohibit benefits for the conversion of SRO's, appellants applied to HPD for benefits for the conversion of their buildings. HPD denied the applications on the ground that the conversion was commenced after July 1, 1982, the statutory cut-off date, and thus did not qualify.

OPINIONS BELOW

SUPREME COURT, NEW YORK COUNTY
(Not Reported)

The Supreme Court of the State of New York, New York County, upheld the constitutionality of the re-enactment and amendment of the J51 law. After examining the criteria established by court decisions to determine when retroactive legislation is constitutional, the court held that: (a) there was no evidence in this case that appellants would not have voluntarily taken exactly the same actions regardless of the impending legislation, as evidenced in part by their completion of the conversion even after the new law was enacted; (b) there could be no justifiable reliance on the law when it was no longer extant; (c) the length of the retroactive period was not excessive under the circumstances; and (d) the retroactivity served a valid public purpose of deterring evasive maneuvers in the period between the

introduction of the SRO bill and its enactment into law (JS-A-9-12).

APPELLATE DIVISION
125 AD2d 1014
508 NYS2d 965 (1st Dept., 1986)

The Appellate Division affirmed the judgment of Special Term, without opinion (JS-A-7-8).

NEW YORK COURT OF APPEALS
70 NY2d 451
517 NE2d 200
522 NYS2d 485 (1987)

The Court of Appeals unanimously affirmed the order of the Appellate Division. Judge Alexander, writing for the Court, stated that at the time appellants commenced their project, they could not have justifiably relied on the continued availability of J51 tax benefits. Under the circumstances, therefore, the retroactive application of the amendment to RPTL §489 and Admin. Code §11-243 did not effect an unconstitutional deprivation of due process rights.

The opinion reiterates the well established law, enunciated by both the New York state and federal courts, that retroactivity provisions in tax statutes, when limited to a short period, are generally valid and not vulnerable to due process challenges. The only exception is when the law is so harsh and oppressive that it transgresses the constitutional bounds. This is a question of degree, requiring a balancing of the equities.

The factors that must be balanced are the following: (a) forewarning to the taxpayer of a change in the law and, thus, the reasonableness of reliance on the old law; (b) the strength of the claim to the benefit prior to enactment of the new legislation; (c) the length of retroactivity; and (d) the public purposes served by retroactivity.

As noted in the opinion, the relevant considerations here did not militate in appellants' favor. The period of retroactivity was not excessive (conceded by appellants themselves, JS-A-5); the objectives of retroactive application served a valid public purpose; and most important, reliance on the continuation of the tax incentive program was not justified.

Appellants were forewarned that changes might be made in the program when the state enabling legislation expired on June 1, 1982, and was not immediately renewed. Therefore, appellants could not claim that, notwithstanding the signs to the contrary, it was reasonable to anticipate that their SRO conversions, commenced after the cut-off date, would qualify for the expired benefits. The Court of Appeals concluded that there could be no reasonable expectation of entitlement to prior J51 tax benefits based

on renovations commenced in 1983 (JS-A-1-6).

ARGUMENT

THIS APPEAL SHOULD BE DISMISSED FOR LACK OF A SUBSTANTIAL FEDERAL QUESTION. THE JUNE 1983 RE-ENACTMENT OF J51 DID NOT DEPRIVE APPELLANTS OF ANY CONSTITUTIONAL RIGHT. RELIANCE COULD NOT REASONABLY BE PLACED ON RE-ENACTMENT WITH THE SAME BENEFITS; THERE WAS NO VESTED RIGHT IN THE EXEMPTION; AND THE NEWLY ENACTED PROVISIONS SERVED A LEGITIMATE PUBLIC PURPOSE AND WERE REASONABLE IN DURATION.

There is universal agreement that retrospective tax legislation is not necessarily unconstitutional. Welch v. Henry, 305 U.S. 134, 146 (1948); Wilgard Realty Co., Inc. v. Commissioner of Internal Revenue, 127 F.2d 514 (2d Cir.), cert. denied, 317 U.S. 655 (1942); Matter of Neuner v. Weyant, 63 AD2d 290, 298, 408

NYS2d 89, 94 (2d Dept., 1978), appeal dismissed, 48 NY2d 974, 401 NE2d 434, 425 NYS2d 1030 (1979).

Neuner involved the constitutionality of retroactive tax legislation, designed to delay implementation of a real property tax exemption. As shown by the federal and state case law discussed therein, retroactive tax legislation is generally upheld. With reference thereto the opinion specifically notes:

> "Legislation readjusting rights and burdens is not unlawful solely because it upsets otherwise settled expectations" (Usery v Turner Elkhorn Min. Co., 428 US 1, 16), and "taxpayers have no vested right either in any decision or in any statute" (Harte v United States, 152 F Supp 793, 797, aff'd 252 F2d 259). Retroactive tax legislation constitutes "legislative decision-making in the economic domain" and "[o]rdinarily, as long as the legislature's economic policies fall within the scope of its constitutional authority, foster no invidious discrimination, infringe no independent constitutionally protected interest, and reasonably serve legitimate legislative purposes, the substantive

requirements of Due Process are satisfied" (Matter of Cartridge Tel., 535 F2d 1388, 1392).

63 AD2d at 299, 408 NYS2d at 95.

Accordingly, the standards to determine whether retrospective tax legislation constitutes a denial of due process are: (1) whether the taxpayer took voluntary actions in reasonable reliance on the superseded law, (2) the strength of the taxpayer's claim to benefits, (3) whether a valid public purpose was served by retroactivity, and (4) whether the period of retroactivity was justifiable.

Applying these standards to the J51 legislation involved herein leaves no doubt that appellants' claim of unconstitutionality has no merit.

(1)

The first standard has two aspects: (a) whether the taxpayer's reliance on the superseded law was voluntary, and (b)

whether this reliance was justified based on the forewarning of a change in the legislation.

(a)

With reference to voluntary reliance, appellants argue that the J51 program induced them to purchase and renovate their buildings and that no change in that program was forewarned. They contend that, since the courts have generally held retroactive gift tax legislation to be unconstitutional on the ground that a taxpayer would not have voluntarily made the gift if change had been foreseen, the 1983 J51 law by analogy must similarly be held unconstitutional.

This strained argument has been properly rejected by the courts. To give a gift and to expect not to be taxed on it, is hardly comparable to buying taxable real property for reconstruction with the idea

that at some future date, if a variety of statutory qualifications are satisfactorily met, an application for a then to be determined amount of exoneration from tax liability might be granted. As stated in Welch v. Henry, 305 U.S. at 147: "Property taxes and benefit assessments of real estate, retroactively applied, are not open to the objection successfully urged in the gift cases."

Furthermore, the cases in which retroactive gift taxes were struck down were based on the important fact, not present herein, that it was a new tax never before imposed so that it could not have been reasonably anticipated. Welch v. Henry, 305 U.S. at 147; Estate of Ekins v. Commissioner of Internal Revenue, 797 F.2d 481, 484 (7th Cir. 1986). The retroactive elimination of a pre-existing tax exemption, as in the case at bar, however, is vitally different from

retroactive imposition of a new tax. Consequently, its validity is not governed by the precedent of the retroactive gift tax cases.

The significant distinction between the two types of tax laws was clearly drawn in Ekins. That case upheld the constitutionality of a retroactive amendment to the Internal Revenue Code, which "had the effect of eliminating an exemption for transfers of life insurance policies from the taxable value of decedent's gross estate." 797 F.2d at 482, 483 (emphasis added).

The court discussed two types of retroactive tax legislation, one that imposes a new tax, generally held to be unconstitutional because it could not be reasonably anticipated, and the other that involves merely a fluctuation in tax rate, which have been upheld as constitutional. As stated in the opinion, an elimination of an

exemption "is more analogous to the retroactive increase of the tax base of an already-existing tax approved in Darusmont [449 U.S. 292] than of a retroactive imposition of a wholly new kind of tax in the early decisions like Coolidge [274 U.S. 531 or 282 U.S. 582]." 797 F.2d at 484. The reasoning was that the tax was already in existence and the law eliminating the exemption merely reduced the categories of property eligible for exclusion from the pre-existing tax. Finally, the court opined that, "[w]ere we to reverse the United States Tax Court's decision, we would be taking the position that tax exemptions can never be repealed or enacted because of retroactivity." 797 F.2d at 485.

(b)

Nor can appellants succeed by citing gift tax cases to show that it was reasonable

for them to have relied on re-enactment of the expired statute without change.

Even if the J51 statute were like retroactive gift tax case legislation, this still would not make it unconstitutional. See, e.g., Milliken v. United States, 283 U.S. 15 (1931), which upheld a retroactive gift tax. "The broader focus is upon whether the taxpayer's 'reliance' has been justified under all the circumstances of the case and whether his 'expectations as to taxation [have been] unreasonably disappointed.' " Neuner, 63 AD2d at 300, 408 NYS2d at 96 (emphasis in original) (quoting Wilgard Realty Co., Inc. v. Commissioner of Internal Revenue, 127 F.2d at 517). Also cited in Neuner is Matter of Chrysler Properties v. Morris, 23 NY2d 515, 521, 245 NE2d 395, 398, 297 NYS2d 723, 727 (1969), which indicates that at some point the reliance factor becomes the predominant element.

Here, not only do the facts fail to show reasonable reliance but, also, the law is well settled that there is no vested right in existing legislation or rules of law to preclude their change or repeal. I.L.F.Y. Co. v. Temporary State Housing Rent Commission, 10 NY2d 263, 270, 176 NE2d 822, 826, 219 NYS2d 249, 254 (1961), appeal dismissed, 369 U.S. 795 (1962); Matter of West, 289 N.Y. 423, 431, 46 NE2d 501, 505 (1943), aff'd sub nom. Demorest v. City Bank Farmers Trust Co., 321 U.S. 36 (1944); Preston Co. v. Funkhouser, 261 N.Y. 140, 144, 184 N.E. 737, 739, aff'd, 290 U.S. 163 (1933).

Even more particularly, there is no vested right in statutory privileges and exemptions. Gattis v. Gravett, 806 F.2d 778 (8th Cir. 1987); Brearley School, Limited v. Ward, 201 N.Y. 358, 94 N.E. 1001 (1911); Bronx Garment Center v. City of

New York, 199 Misc. 513, 106 NYS2d 720 (Sup. Ct., Bronx Co., 1951), aff'd, 279 App. Div. 1048, 113 NYS2d 257, leave to appeal denied, 280 App. Div. 890, 115 NYS2d 524 (1st Dept., 1952). In Adelman v. Adelman, 58 Misc 2d 803, 806, 296 NYS2d 999, 1004 (Sup. Ct., Queens Co., 1969), the court explained that a right is not vested unless it is something more than a mere expectation based upon an anticipated continuation of the general law.

In Matter of Grossman v. Wagner, 20 Misc 2d 707, 712, 192 NYS2d 557, 563 (Sup. Ct., N.Y. Co., 1959), concerning a new subdivision added to the J51 law eliminating benefits for certain projects, the court opined:

> It is well settled that statutes granting tax exemption and similar statutes are, in the absence of a contract to continue the exemptions or other privileges granted, revocable at the will of the Legislature, and this is so notwithstanding the fact that persons

may have performed acts or expended money in reliance upon the statutes prior to their repeal or modification. The rule is stated as follows in Cooley's authoritative Law of Taxation (4th ed., Vol. 2), in section 701: "If the grant of an exemption does not constitute a contract it is revocable by the power which made the grant. It is perfectly well settled that an exemption granted from motives of state policy merely, and where the state and the citizen do not meet on a basis of bargain and consideration, is to be deemed expressive only of the present will of the state on the subject; and the law granting it, like laws in general, is subject to modification or repeal in the legislative discretion, and it is immaterial that while it continued in force persons have acted in reliance upon it. * * * a state may, at its pleasure, withdraw an exemption which is a mere gratuity possessing no element of a contract, even though the corporation may have incurred expense on the faith thereof." (Citing in n. Grand Lodge F. & A. Masons of Louisiana v. City of New Orleans, 166 U.S. 143; emphasis mine.) The cases supporting[4] the language of the text are legion.

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[4] This position was adopted by the court at a later stage of the Grossman case in

(Footnote Continued)

In light of the facts and the law, appellants could not and should not have relied on re-enactment of the enabling legislation with all the benefits formerly provided. The fact that the enabling statute was allowed to expire, although the local law remained in effect for a slightly longer term, was alone a definite warning that J51 benefits were being subjected to review and open to change in the enactment of any new enabling statute. See "J-51's Uncertain Future Slows Major Renovations", New York Law Journal 11/17/82, p. 35. This was noted by the Court of Appeals as follows:

> [W]e are persuaded that petitioner could not have justifiably relied on the tax inducement as it existed in

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(Footnote Continued)
dismissing the challenges to the J51 amendment. Matter of London v. Wagner, 22 Misc 2d 360, 363-64, 195 NYS2d 550, 555 (Sup. Ct., N.Y. Co., 1959), aff'd, 13 AD2d 479, 214 NYS2d 647 (1st Dept., 1961), aff'd, 11 NY2d 762, 181 NE2d 759, 227 NYS2d 13 (1962).

> 1982. New York City's J-51 program -- although extended by local law to 1984 -- was subject to such changes as may have been made in the State enabling legislation itself, which authorized the tax exemption in the first instance. Petitioner was forewarned that the state authorization expired on June 1, 1982, thereby calling into question the continued validity of the local law after that date. With such notice, petitioner may not now claim he entertained a settled reasonable expectation of entitlement to the City's exemption based upon renovation he did not commence until April 1983.

70 NY2d at 457, 517 NE2d at 203, 522 NYS2d at 488 (JS-A-6).

Moreover, both under the old as well as the new statute, benefits do not come into being until HPD determines that all conditions of the J51 program are met. The record leaves no doubt that appellants were well aware that, under the program, benefits did not vest upon commencement, but only after the project was completed and application was made to HPD for a determination of eligibility. Thus, even if

the statute had been re-enacted without any change, there was still no assurance, certainly no guaranty, that appellants would receive benefits and, if so, to what extent.

The J51 program, like other legislated tax exemptions, confers no vested rights. For appellants to contend that they were induced to buy SRO's for conversion to cooperatives in reliance on the same exemptions being granted without regard to currently revealed public needs is manifestly unreasonable and in no way impugns the constitutionality of legislative changes made to meet those needs.[5]

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[5] Contrary to appellants' assertion on pages 6 and 8 of their Jurisdictional Statement, there is no conflict between the decision below and LeCroy Research Systems Corporation v. Commissioner of Internal Revenue, 751 F.2d 123 (2d Cir., 1984). In LeCroy, the Internal Revenue Service was estopped from retroactively applying a regulation where specific prior assurances

(Footnote Continued)

(2)

As to the second standard (supra, p. 15), there is no strength to appellants' claim to benefits. As demonstrated above, appellants had no legal right to rely on benefits remaining unchanged (supra, pp. 21-23) and the facts do not support any such reliance (supra, pp. 24-26). Thus, there is no vested right and no valid claim to the exemption.

(3)

Coming to the third standard (supra, p. 15), there can be no doubt about the public purpose served by the limited retroactivity at issue in this case. As stated by the Court of Appeals: "The objectives of the retroactive application - to forestall the loss of SRO housing and to discourage the precipitous eviction of tenants

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(Footnote Continued)
had been given that the regulation would only be prospective.

- are valid public purposes." 70 NY2d at 457, 517 NE2d at 203, 522 NYS2d at 488 (JS-A-5-6).

Accordingly, the retroactivity of the legislation here, where the government had a legitimate concern "that evasive measures taken after introduction of a bill but before enactment might frustrate the purpose of the legislation", was necessary and properly sanctioned. Matter of Neuner, 63 AD2d at 302, 408 NYS2d at 97 (quoting Purvis v. United States, 501 F.2d 311 (9th Cir. 1974), cert. denied, 420 U.S. 947 (1975)).

(4)

Finally, the period of retroactivity meets the fourth standard of being justifiable (supra, p. 15). "Retroactivity in taxation which would otherwise be so arbitrary as to be unconstitutional may escape such disability if it is not too great in point of time." Wilgard Realty Co., Inc. v.

Commissioner of Internal Revenue, 127 F.2d at 517, cert. denied, 317 U.S. 655 (five years retroactivity upheld). The Court of Appeals here observed that appellants, themselves, conceded that the period of retroactivity is not excessive (JS-A-5).

In sum, the decision of the Court of Appeals correctly evaluated the facts and applied the governing law. There is no merit in appellants' attempt to obtain further judicial review.

CONCLUSION

The appeal should be dismissed or, alternatively, the judgment appealed from should be affirmed.

March 2, 1988

Respectfully submitted,

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APPENDIX

Statutory Provisions

New York Real Property Tax Law §489[1] provides in part:

> 1.(a) Any city to which the multiple dwelling law is applicable, acting through its local legislative body or other governing agency, is hereby authorized and empowered, to and including June first, nineteen hundred eighty-six, to adopt and amend local laws or ordinances providing that any increase in assessed valuation of real property shall be exempt from taxation for local purposes, as provided herein, to the extent such increase results from:
>
> (1) conversion of buildings or structures on such property to class A multiple dwellings not used in whole or in part for single room occupancy....
>
> * * *

---

[1] As amended by L. 1983, c. 401, §6, effective June 30, 1983, retroactive to June 1, 1982. The amendment deleted from subdivision 1(a)(1) a reference to the conversion of "class B multiple dwellings," added subdivision 13, and at §15 of c. 401 stated: "this act shall only apply to conversions, alterations or improvements commenced on or after July first, nineteen hundred eighty-two."

13. Additional limitation. The benefits of this section shall not apply to any conversion of or alteration or improvement to any class B multiple dwelling or class A multiple dwelling used in whole or in part for single room occupancy, regardless of the status or use of the building after the conversion, alteration or improvement unless such conversion, alteration or improvement is carried out with the substantial assistance of grants, loans or subsidies from any federal, state or local agency or instrumentality.

Section 11-243 (formerly §J51-2.5)[2] of the Administrative Code of the City of New York provides in part:

i. The benefits of this section shall not apply:

* * *

(6) to any conversion of or alteration or improvement, commenced on or after July first, nineteen hundred eighty-two, to any class B multiple dwelling or class A multiple dwelling used in whole or in part for single room occupancy, regardless of the status or use of the building after the conversion, alteration or improvement unless such conversion, alteration or improvement is carried out with the

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2 As amended by Local Law No. 56 of 1983, enacted on November 7, 1983, to be effective immediately and to be deemed to have been in full force and effect since June 1, 1982.

substantial assistance of grants, loans or subsidies from any federal, state or local agency or instrumentality.[3]

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[3] According to §11(1) of Local Law No. 56, relating to the law's effective date, "paragraph (6) of subdivision i... shall apply only to conversions, alterations or improvements commenced on or after July first, nineteen hundred eighty-two".